IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:-

THE HONOURABLE THE CHIEF JUSTICE MR.H.L.DATTU
&
THE HONOURABLE MR. JUSTICE K.T.SANKARAN

THURSDAY, THE 6TH SEPTEMBER 2007 / 15TH BHADRA 1929

W.A.No.96 of 2007(E)

AGAINST THE JUDGEMENT IN W.P.(C).NO.11366 OF 2006-C DATED 25/07/2006 & ORDER IN R.P.NO.759 OF 2006 IN W.P.(C). NO.11366 OF 2006-C DATED 22/09/2006.

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APPELLANT: PETITIONER/REVIEW PETITIONER:-

K.K. SURESH, S/O.K.K. KURUP,
KALARIKAL HOUSE, P.O. PATTIMATTOM,
ERNAKULAM DISTRICT.

BY ADV. SRI.P.VIJAYAKUMAR

RESPONDENTS: RESPONDENTS/RESPONDENTS:-

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1. KERALA FINANACIAL CORPORATION,
   REPRESENTED BY ITS MANAGING DIRECTOR
   VELLAYAMBALAM, TRIVANDRUM.

2. DISTRICT MANAGER, KFC, PERUMBAVOOR.

3. BRANCH MANAGER, KFC, PERUMBAVOOR.

4. E.S. ABDUL SAHTHAR,
   S/O. SAIDU MUHAMMED, EMBASSERIL HOUSE,
   P.O. MARAMPILLY, ERNAKULAM DISTRICT.

R1 TO R3 BY STANDING COUNSEL SRI.P.PARAMESWARAN NAIR.
R4 BY ADV.SRI.B.KRISHNAMANI.

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 06/09/2007, ALONG WITH W.A.NO.1111 OF 2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

H.L.Dattu,C.J. & K.T.Sankaran,J.

W.A.Nos.96 of 2007-E & 1111 OF 2007

Dated, this the 6th day of September, 2007

JUDGMENT

K.T.Sankaran,J.

Though W.A.No.96 of 2007 is posted for admission, with the consent of counsel appearing for the parties, both the appeals were taken up for final hearing and are being disposed of by this common judgment.

(2) The parties are referred in this judgment as they appear in the writ petition. The writ petition was filed by K.K.Suresh, who runs an industry under the name and style “Sastha Industries”. The petitioner runs a Soap factory therein.

(3) A loan of Rs.27.84 lakhs was availed by Suresh from the first respondent, Kerala Financial Corporation, for the purpose of his industry. The loan was to be repaid in instalments and the period for repayment would expire in 2010.

(4) Since there was default in payment of instalments, the Kerala Financial Corporation (“KFC” for short) took over the property and the industrial unit under Section 29 of the State Financial Corporations Act on 17.12.2004. Thereafter the KFC thought of selling the property and published a notice of sale in two insignificant newspapers having lesser circulation in the area. The upset price was fixed at Rs.20 lakhs. There was no bidders other than the 4th respondent in the writ petition, viz., E.S.Abdul Sathar. He originally offered Rs.11.1 lakhs and finally as per negotiation, the sale price was fixed at Rs.12.5 lakhs. On 10.04.2006, KFC executed a sale deed in favour of Abdul Sathar.

(5) After the sale was conducted, KFC had sent a letter to Suresh, stating thus:

> "We propose to confirm the sale to highest tenderer for Rs.12.50 lakhs. He has promised to pay the sale consideration within 15 days.
>
> If you are interested to get back possession of the unit on the above terms and conditions, you are requested to remit Rs.12.50 lakhs within 15 days of the receipt of this notice failing which the Corporation will confirm the sale of plant & machinery/land and building".

Suresh sent a reply dated 2nd February, 2006 stating that he was prepared to pay Rs.12.5 lakhs. He again sent another letter on the same day stating that the articles available in the industrial unit would fetch a price of Rs.9 lakhs and that he would remit the said amount if he were allowed to sell the same. However, on 10.04.1006, ignoring the offer made by Suresh, KFC executed the sale deed in favour of Abdul Sathar.

(6) W.P.(C).No.11366 of 2006 was filed by Suresh in these circumstances. He originally prayed for a writ of mandamus commanding the KFC to desist from effecting the sale of his industrial unit. Later, on coming to know that the property was sold, he amended the prayer and sought for a declaration that the sale made in favour of Abdul Sathar is illegal, unconscionable and void and that the sale effected does not confer any right to Abdul Sathar. Abdul Sathar was impleaded as additional 4th respondent in the writ petition.

(7) When the writ petition came up for hearing, the learned Single Judge thought that it was a fit case for settlement between the parties.

At the suggestion made by the learned Single Judge, a consensus emerged and the writ petition was disposed of as per judgment dated 25th July, 2006. The learned Single Judge recorded the consensus and disposed of the writ petition in the following manner:

> "Initially the parties were adamant on thrashing out the issue on merits. However, after some persuasion from the court the parties agreed for a compromise formula as suggested by this court. In accordance with the consensus so reached, I dispose of this writ petition on the following terms:
>
> The 4th respondent would be entitled to return of the money he has paid as consideration for the sale of the properties by the KFC. He is also entitled to get the expenses incurred by him in the matter of execution of the sale deed, such as stamp duty, registration fees, charges of document writers as per schedule and other expenses if any. The 4th respondent would also be entitled to be duly compensated by way of interest on the amount he has parted with for the purpose of purchase of the property. Accordingly, the KFC shall inform the petitioner as to the total amount due to the 4th respondent by way of expenses incurred by him towards stamp duty, registration fees and charges paid to the document writer (as per schedule) along with nine per cent interest on the amount, from the date of payment till refund of the same, within two weeks from today. On receipt of the intimation, the petitioner shall pay the amount within a period of one week from the date of receipt of the intimation. On receipt of the payment, the KFC shall pay the amounts so paid by the petitioner along with the amount received from the 4th respondent as sale consideration immediately. The petitioner

> shall pay an amount of Rs.5 lakhs to the KFC, by way of repayment of dues under the loan agreement, within a period of one month from today. The balance amount, the petitioner shall pay in three bi-monthly instalments starting from 1.9.2006. On receipt of the entire amounts due, the 4th respondent shall execute a reconveyance deed at the expense of the petitioner. If the petitioner commits default of any of the directions above at any time, the sale in favour of the 4th respondent would stand confirmed and further proceedings would be taken accordingly. On receipt of the amounts due to the 4th respondent, the possession of the mortgaged property shall be handed over to the petitioner".

(8) Suresh paid the entire amount payable to Abdul Sathar as directed by the learned Single Judge. He deposited the amount with KFC. KFC issued two Demand Drafts to Abdul Sathar, one for Rs.12.50 lakhs and the other for Rs.1,62,099/-. Thus, Abdul Sathar has got the full amount which he was entitled to as per the order of the learned Single Judge, which was on the basis of the consensus among Abdul Sathar, KFC and Suresh. However, Suresh could not pay Rs.5 lakhs which was directed to be paid to the KFC as per the judgment of the learned Single Judge. Suresh filed R.P.No.759 of 2006 to review that part of the judgment of the learned Single Judge by which he was directed to pay Rs.5 lakhs to KFC. He also sought to review the judgment, so that he could make an application for One Time Settlement ("OTS" for short) with KFC and he could get certain benefits with regard to the balance amount due to the KFC. This review petition was disposed of by the learned Single Judge as per order dated 22nd September, 2006. The learned Single Judge noticed the objection made by Abdul Sathar. It was held thus:

> "..... Now the petitioner submits that he has paid off the entire amounts due to the additional 4th respondent. However, since on such payment, he has exhausted his financial resources, he needs further time to pay Rs.5 lakhs as also the first instalment payable on 1.9.06. As the judgment was on the basis of a consensus among the parties, the petitioner is not justified in making such a request. However, as a matter of indulgence, I grant two more weeks time to him from today to the petitioner to pay the amount of Rs.5 lakhs and the first instalment payable on 1.9.06. The petitioner would be free to pursue his Ext.P8 application for one time settlement, which the first respondent shall consider in accordance with the scheme applicable. The 1st respondent may, if they decide to grant the benefit of one time settlement, adjust the amount of instalments payable as directed above accordingly.
>
> 2. I must also record the objections raised by the 4th respondent to the review petition. The counsel for the 4th respondent submits that the petitioner is not entitled to any further indulgence in the matter. However, now that the entire amount due to the 4th respondent with interest etc. have been fully paid, I am not inclined to consider the objections of the 4th respondent in the matter".

The order in the review petition as well as the judgment in the writ petition are under challenge at the instance of Suresh in W.A.No.96 of 2007.

(9) Against the judgment of the learned Single Judge, Abdul Sathar filed W.A.No.1933 of 2006, but that was withdrawn with liberty to file a review petition. Subsequently, Abdul Sathar filed R.P.No.241 of 2007, which was dismissed by the learned Single Judge as per order dated 28th February,

2007. The order passed in R.P.No.241 of 2007 is under challenge by Abdul Sathar in W.A.No.1111 of 2007.

(10) It is not disputed that the amount payable to Abdul Sathar as per the consensus arrived at between the parties was paid. It is stated in the Writ Appeal filed by Suresh that Abdul Sathar though did not comply with the direction to handover possession of the property within time, later, after the dismissal of W.A.No.1933 of 2006, he handed over possession of the property to Suresh in November, 2006. This statement made in the Writ Appeal is not disputed by way of any pleading by Abdul Sathar, though Sri.Krishnamani, learned counsel appearing for Abdul Sathar made a feeble attempt to controvert that statement. It is also not in dispute that the extra amount which was directed to be paid to the auction purchaser-Abdul Sathar was also paid to him. In paragraph 13 of the Memorandum of Writ appeal filed by Suresh, it is stated that subsequent to the judgment of the learned Single Judge Suresh had paid various amounts to KFC. We extract paragraph 13 of W.A.No.96 of 2007 here:

> "It is respectfully submitted over and above the payment of Rs.13 lakhs on 18/4/06 pursuant to the interim order that subsequent to the final judgment of the learned single judge the appellant remitted an amount of Rs.5 lakhs being the initial instalment and Rs.3 lakhs towards the first of 3 bi-monthly installments within time as provided under Annexure 8 order in Review. Later the appellant remitted Rs.1 lakhs more over on 1.4.06 towards the second instalment as directed by the learned single judge on the further offer given by KFC authorities that the entire amounts of payments subsequent to the filing of the writ petition would be reckoned

> for the purpose of offering the benefits of OTS to the appellant, making an overall payment of Rs.22 lakhs after filing of writ petition".

It is stated in the Memorandum of Writ Appeal that subsequent to the filing of the writ petition, more than Rs.22 lakhs was paid by Suresh to KFC. This is not denied by the KFC.

(11) As per the judgment rendered on consensus, the sale was set aside and the auction purchaser was directed to reconvey the property to the owner of the property. Possession of the property was handed over to the owner, but reconveyance deed was not executed by the auction purchaser-Abdul Sathar in favour of the owner-Suresh. It is submitted by Sri.P.Vijayakumar, learned counsel appearing for Suresh that because of the non-execution of the reconveyance deed by the auction purchaser, the owner Suresh is faced with various difficulties, including inability to get the electricity connection restored.

(12) Sri.Krishnamani, learned counsel appearing for the auction purchaser submitted that the writ petition itself was not maintainable and the learned Single Judge was not justified in passing any order, even on consensus.

(13) It is to be noted that in the review petition filed by the auction purchaser there is no statement that in fact no consensus was arrived at between the parties. That there was consensus is recorded in the judgment of the learned Single Judge. In the absence of any averment in the review petition disputing any such consensus, the auction purchaser-Abdul Sathar was not entitled to file a review petition challenging the directions issued by the

learned Single Judge on consensus. It is settled position that a consent granted by the counsel on the facts would be binding on the party. In *BSNL* v. *Subash Chandra Kanchan* [(2006) 8 SCC 279], the Supreme Court held as follows:

> "Furthermore, in terms of Order 3 Rule 1 of the Code of Civil Procedure, a litigant is represented by an advocate. A concession made by such an advocate is binding on the party whom he represents. If it is binding on the parties, again subject to just exceptions, they cannot at a later stage resile therefrom. The matter may, however, be different if a concession is made on a question of law. A wrong concession on legal question may not be binding upon his client. Here, however, despite the stand taken by the appellant in its written statement before the High Court the learned advocate consented to appointment of a person as an arbitrator by the High Court in exercise of its jurisdiction under Section 11 of the 1996 Act, in our considered view, the same should not be permitted to be resiled from. A person may have a legal right but if the same is waived, enforcement thereof cannot be insisted."

Moreover, the benefit of a part of the package of consensus was enjoyed by the auction purchaser-Abdul Sathar by receiving the amounts directed to be paid to him as per the judgment of the learned Single Judge. He received the amount and restored possession of the property to the owner, but refused to reconvey the property to him. It is the contention of the learned counsel appearing for the auction purchaser that the writ petition itself was not maintainable and the learned Single Judge was not justified in passing any order, including an order on the basis of consensus. We are unable to accept

this contention and that too, at this belated stage. Having received the amounts after the judgment was passed, it was ill-grace on the part of the auction purchaser to contend that the learned Single Judge was not justified in passing an order on the basis of consensus. His contention is that Suresh had alternate remedies and therefore the writ petition was not maintainable. The Supreme Court in *L.K.Verma* v. *HMT Ltd.* [(2006) 2 SCC 269] held thus:

> "In any event, once a writ petition has been entertained and determined on merit of the matter, the appellate court, except in rare cases, would not interfere therewith only on the ground of existence of alternative remedy. (See Kanak v. U.P.Avas Evam Vikas Parishad [(2003) 7 SCC 693]). We, therefore, do not see any justification to hold that the High Court wrongly entertained the writ petition filed by the respondent."

Therefore, we are inclined to hold that W.A.No.1111 of 2007 is devoid of any merits. Therefore, we dismiss that Writ Appeal.

(14) In so far as Writ Appeal No.96 of 2007 filed by the owner of the property - Suresh is concerned, now the auction purchaser - Abdul Sathar - is out of picture. The dispute is between KFC and Suresh. The liability to KFC is to be discharged, spread over for a period upto 2010. There is no dispute that amounts are due to KFC from Suresh. KFC has taken action under Section 29 of the State Financial Corporations Act and proceeded to take over the industrial unit. The property was sold in auction. Now that the sale is set aside and the property is delivered over to the owner, the KFC could very well exercise its powers under Section 29 of the State Financial

Corporations Act, if occasion arises. It is submitted by the owner that he is prepared to discharge the whole liability to KFC on the basis of OTS (One Time Settlement). KFC has also not stated that it was unwilling for OTS. By passage of time, things happened in such a manner that the property was sold in auction. Now that the sale is set aside and the liability not being disputed, the KFC is in a position to consider the application for OTS filed by the owner-Suresh. In the circumstances, we are inclined to issue a direction to KFC to consider the application filed by the owner/defaulter for OTS. If application was filed earlier, the KFC shall consider the same within a period of two months. A copy of the application for OTS shall be forwarded by Suresh to KFC for easy reference. The payments already made by Suresh shall also be taken note of by KFC while considering the application for OTS.

(15) Abdul Sathar shall execute a reconveyance deed in favour of Suresh within a month's time from today. The cost of stamp paper, fee for executing reconveyance deed and other necessary expenses shall be borne by Suresh.

In the result, while dismissing W.A.No.1111 of 2007 filed by the auction purchaser Abdul Sathar, W.A.No.96 of 2007 filed by the owner Suresh is allowed as indicated above.

H.L.Dattu
Chief Justice

K.T.Sankaran
Judge

vku/-